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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 119

SAMUEL REISMAN and CHARLES M. TRAMMELL, BERT B. RAND, HANS A. NATHAN, d/b/a TRAMMELL, RAND & NATHAN, *Petitioners*,

v.

HON. MORTIMER M. CAPLIN and ROBERT S. MACCLURE and EDWARD H. HARNEY, co-partners and all other co-partners of ROBERT S. MACCLURE, as a class, d/b/a PEAT, MARWICK, MITCHELL & Co. (a co-partnership), *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals (R. 156 to 161) is reported at 317 F. 2d 123. The Findings of Fact, Conclusions of Law, and Order of Dismissal by the United States District Court for the District of Columbia (R. 145 to 150) are reported at 61-2 USTC ¶ 9673.

JURISDICTION

The judgment of the United States Court of Appeals was entered on February 7, 1963 (R. 162). Petition for Writ of Certiorari was timely filed, and was granted on June 17, 1963 (R. 163). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. The first question presented is whether a suit to restrain the Commissioner of Internal Revenue from enforcing a subpoena issued under color of Section 7602 of the Internal Revenue Code of 1954 is barred by the Sovereign Immunity Doctrine where enforcement of such subpoena is alleged to be in violation of the Fourth, Fifth and Sixth Amendments to the Constitution and outside the Commissioner's statutory authority.

2. The second question presented is whether a taxpayer may be deprived of the effective assistance of Counsel by Respondent-Commissioner's forcing Counsel to reveal to him their entire trial preparation in advance of trial.

3. The third question presented is whether the attorney-client privilege against disclosure by an attorney of confidential communications between him and his client, extends to non-lawyer accountants and clerks, employed by the attorney.

4. The fourth question presented is whether an attorney who has hired a Certified Public Accountant (1) to assist him in preparation for trial, and (2) to enable him to give legal advice to a taxpayer-client with regard to pending criminal investigation against the taxpayer, has "standing to sue" in order:

(a) to protect his client against violation of the client's privilege against self-incrimination and of the attorney-client privilege;

(b) to protect his own ability to fulfill his duty as an officer of the Court and attorney-at-law;

(c) to protect against appropriation by opposing Counsel of the attorney's property rights in his work-product.

STATUTE INVOLVED

The statutory provisions involved are Sections 7602 and 7604 of the Internal Revenue Code of 1954, 26 U.S.C. 7602, 7604, reading as follows:

68A, Stat. 901; 26 USC § 7602
Sec. 7602, Internal Revenue Code of 1954:

Sec. 7602. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant to such inquiry.

68A, Stat. 902; 26 USC § 7604

Sec. 7604, Internal Revenue Code of 1954:

> Sec. 7604. (a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.
>
> (b) Enforcement.—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

STATEMENT

Petitioners are attorneys. Respondent Mortimer M. Caplin is the Commissioner of Internal Revenue and respondents Peat, Marwick, Mitchell & Co. are Certified Public Accountants. The accountants were employed by the attorney-petitioners for the specific purpose of assisting them in connection with certain civil and criminal proceedings arising from an alleged large tax liability of two United States citizens, husband and wife, involving a multitude of individual commercial and financial transactions.

On June 30, 1961, respondent-Commissioner, under color of Section 7602 of the Internal Revenue Code of 1954, issued subpoenas to three branches of the world-wide respondent-accounting firm (in Los Angeles, Chicago and New York), requiring the accountants to testify before a Special Agent of respondent-Commissioner on the work performed in the employment of petitioner-attorneys, and to produce all documents, work papers and other material in their possession.

Respondent-accountants advised petitioner-attorneys that they intended to comply with the subpoena in every respect. (R. 10, 46)

At the time of service of the subpoenas four civil tax cases contesting deficiencies in income tax—determined by respondent-Commissioner more than a year earlier—were set down for trial in the Tax Court to begin October 1961. Criminal investigation was then (and still is) being carried on by respondent. (R. 46)

Neither attorney-petitioners nor respondent-accountants had taken any part in preparing any tax returns for, or in giving accounting advice to, the taxpayers. (R. 45) Their engagement was concerned solely with the defense of the pending civil and criminal litigation. (R. 18, 45)

To avoid disclosure and unlawful appropriation of their work-product and trial preparation by their opponent, and to prevent the unconstitutional seizure without warrant of confidential and privileged documents for future use as evidence in criminal proceedings, petitioners, upon a sworn complaint and supporting affidavit alleging the unlawfulness and unconstitutionality of the Commissioner's action (R. 2 *sequ.*), moved for and obtained a temporary Restraining Order in the United States District Court for the District of Columbia. (R. 41, 53) Several weeks later (but still prior to trial in the Tax Court), another judge of the same court dissolved the Restraining Order.

granted the Commissioner's motion to dismiss (which motion was unsupported by any affidavit or evidence) (R. 71) and held, as a matter of law, that petitioners had no "standing to sue". (R. 149)

The Court of Appeals for the District of Columbia Circuit affirmed the Judgment of the District Court, holding that the Complaint was properly dismissed, but for different reasons than those relied on by the District Court, namely, that:

> . . . it is not within the Court's jurisdiction because it is, in substance, a suit against the United States to which it has not consented.
>
> 312 F. 2d at p. 125. (R. 158)

This Court granted certiorari. 83 S. Ct. 1873 (R. 163)

SUMMARY OF ARGUMENT

Contrary to the holding of the Court of Appeals for the District of Columbia Circuit, the decisions by this Court in *Malone* v. *Bowdoin*, 369 U.S. 643, 82 S. Ct. 980, and *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 69 S.Ct. 1457, do not bar this suit to restrain the enforcement of a Sec. 7602 Internal Revenue subpoena under the sovereign immunity doctrine.

The distinguishing factors between the case at bar and suits proscribed by *Larson* and *Malone* are these:

In *Malone* and *Larson* (each of which cases involves a dispute between an individual and a government officer over property held or taken by the officer in the constitutional exercise of his statutory power and discretion), no allegations are made that the officer exceeded his statutory powers or that he exercised his statutory powers in a constitutionally invalid manner.

In the instant case the respondent-government officer (1) is shown to have exceeded his statutory authority by using a Revenue subpoena for the purpose of illegally

appropriating attorneys' trial preparation and work product; and (2) the action of the officer is shown to be constitutionally void in that it violates constitutional privileges under the Fourth, Fifth and Sixth Amendments assuring protection against unreasonable searches and seizures, against self-incrimination and deprivation of liberty and property without due process of law and against deprivation of the right to effective assistance of Counsel.

The decision of the Court of Appeals for the District of Columbia Circuit therefore is unsupported by the authorities on which it relies. It is in conflict with decisions of the Courts of Appeals for the Second and Ninth Circuit in *Application of Colton*, 291 F. 2d 487 (C.A. 2, 1961), and *DeMasters v. Arend*, 313 F. 2d 79 (1963), respectively. In fact, as conceded by the Court below, the holding is the expression of a policy adopted by the District of Columbia Court of Appeals to extend the sovereign immunity doctrine in order to limit judicial review in Revenue subpoena cases to the enforcement jurisdiction conferred on the District Court under Sec. 7604(b).

Petitioners urge that such extension of the sovereign immunity doctrine is not only barred under the decisions of this Court but is also undesirable as a matter of policy. The remedies, if any, provided under Sec. 7604(b), are inadequate (if available at all) in the case at bar.

Petitioner-attorneys had standing to sue in order to claim and to protect the constitutional and attorney-client privilege of their clients and to shield petitioners' trial preparation, trial strategy and work product from appropriation by their opponent. The findings and holdings of the District Court to the contrary are clearly erroneous. Unless reversed, a taxpayer's right to assistance of Counsel and an attorney's ability to prepare and defend a civil or criminal income tax case will be severely curtailed hereafter.

ARGUMENT

I. THIS SUIT TO RESTRAIN THE COMMISSIONER OF INTERNAL REVENUE FROM PROCEEDING IN AN UNCONSTITUTIONAL AND ILLEGAL MANNER UNDER COLOR OF AUTHORITY OF SECTION 7602, INTERNAL REVENUE CODE OF 1954, IS NOT BARRED BY THE SOVEREIGN IMMUNITY DOCTRINE.

The Court of Appeals held that the suit should have been dismissed under the Sovereign Immunity Doctrine because (1) "[t]he Commissioner has acted within authority delegated by the statute", 317 F. 2d 123 at 125 (R. 158), and (2) "in this case the Commissioner does not appear as yet to have departed from his statutory authority, to say nothing of having so departed as to justify interpreting the suit to be one against him personally, rather than in substance and effect against the United States". *Ibid.*, p. 126 (R. 159).

The holding, we submit, is factually erroneous on the record below and not supported by the authorities cited in the opinion.

A. There was an unconstitutional departure by the Commissioner from his statutory authority.

Petitioners' sworn complaint in the United States District Court for the District of Columbia alleged, among other things, that respondent-Commissioner of Internal Revenue had served on respondent-accountants three summonses "purporting to have been issued under color of authority of Sec. 7602 of the Internal Revenue Code of 1954" (R. 7); that each such summons was "illegal" and had "been issued in violation of the Constitution of the United States because its enforcement would constitute an unreasonable search and seizure", would force petitioners' clients, the taxpayers, "to incriminate themselves in violation of the Fifth Amendment of the Constitution" (R. 8); "would deprive the taxpayers of the effective

assistance of Counsel" because the documents subpoenaed constituted workpapers of Counsel and of Counsel's employees (R. 9). It alleged further that respondent-accountants (unless restrained) would, in fact, comply with the summons despite is illegality, and would deliver over all the documents subpoenaed (R. 10).

Respondent-accountants in their Answer, admitted all the material allegations of the Complaint. Respondent-Commissioner, without filing an answer, successfully proceeded on a Motion to Dismiss. No affidavits or evidence were submitted in support of the Motion. Thus, for the purposes of determining the correctness of the decisions below, the allegations of the Complaint must be taken as true. *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480 (1947), 68 S. Ct. 174.

Certain of the factual allegations in the Complaint appear conceded of record: Respondent-Commissioner did want to use the information and documents in the Tax Court trial then pending (R. 118), and apparently as evidence against the taxpayers before a Grand Jury because of the "*imminent running of the Statute of Limitations on possible criminal offenses*" (Emphasis supplied) (Opposition to Petition to Stay of Mandate before this Court, p. 2).

B. The authorities cited by the Court of Appeals do not support the decision.

The Court of Appeals cites the decisions of this Court in *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 69 S. Ct. 1457 (1949), and in *Malone* v. *Bowdoin*, 369 U.S. 643, 82 S. Ct. 980 (1962), as the main authority for its decision. It "recognizes that the two cases relied on concerned suits over property", but erased

all distinction between the four "well defined categories[1] of cases in which claim is made that a suit against one who holds public office is in fact a suit against the government", by holding that the *Larson* and *Malone* doctrine extends to those cases "where the relief sought would 'interfere with the public administration' ".

As additional authority the Court of Appeals cites at p. 125, *Wells* v. *Roper*, 246 U.S. 335, 38 S. Ct. 317 (1918), and *Louisiana* v. *McAdoo*, 234 U.S. 627, 632, 34 S. Ct. 938 (1914). (R. 159)

It is respectfully submitted that the reliance of the Court of Appeals on these four cases is in error. If affirmed by this Court, the opinion would extend the Sovereign Immunity Doctrine far beyond the holding of this Court in *Larson* and *Malone*.

The Court, in order to affirm the decision of the Court of Appeals, we submit, would have to overrule expressly

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[1] "Our decisions fall under these heads:

(1) Cases in which the plaintiff seeks an interest in property which concededly, even under the allegation of the complaint, belongs to the government; or calls for an assertion of what is unquestionably official authority.

(2) Cases in which action to the legal detriment of a plaintiff is taken by an official justifying his action under an unconstitutional statute.

(3) Cases in which a plaintiff suffers a legal detriment through action of an officer who has exceeded his statutory authority.

(4) Cases in which an officer seeks shelter behind statutory authority or some other sovereign command for the commission of a common-law tort."

Larson v. *Domestic & Foreign Commerce Corporation*, *supra*, at 1471-1472, Dissenting Opinion of Mr. Justice Frankfurter.

its prior holdings in *United States* v. *Lee*, 106 U.S. 196, 1 S. Ct. 240 (1882); *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 23 S. Ct. 33 (1902); *Philadelphia Co.* v. *Henry L. Stimson*, 223 U.S. 605, 32 S. Ct. 340 (1912); *Stark* v. *Wickard*, 321 U.S. 288, 64 S. Ct. 559 (1944); *Land* v. *Dollar*, 330 U.S. 731, 67 S. Ct. 1009 (1947); *Harmon* v. *Brucker*, 355 U.S. 579, 78 S. Ct. 433 (1958); *Leedom* v. *Kyne*, 358 U.S. 184, 79 S. Ct. 180 (1958), the entire line of cases in which jurisdiction was upheld because, in the language of *Malone* v. *Bowdoin*, 369 U.S. 643 at 647, 82 S. Ct. 980 (1962), at 983, citing *Larson, supra:* "... the officer's ... exercise [of his statutory powers] ... in the particular case, [is] constitutionally void."

Only brief analysis appears required to highlight the distinction:

Malone v. *Bowdoin* involved an action in ejectment against a forest service officer by persons who claimed that they were the rightful owners of certain land occupied by that officer in pursuance of his official duties on behalf of the United States. The District Court had granted the Motion to Dismiss relying on *Larson*. This Court "granted certiorari to consider the scope of sovereign immunity in suits of this kind", 369 U.S. 643 at 645, 82 S. Ct. 980 at 982, and held that the suit was not within the class of cases in which, under *Larson*, specific relief can be obtained against a government officer (at 648).

Both *Larson* and *Malone*, in holding and rationale, are limited clearly to cases where there was no affirmative allegation of either a relevant statutory limitation of the officer's power to hold or take property, or of an unconstitutional taking of property without just compensation. The Court in both cases based its finding that there was no unconstitutional "taking without just compensation" on there having "been at all relevant times a tribunal where the respondents could seek just compensation for the

taking of their land by the United States".[2] The Court expressly stated that, construed with this limitation, *United States* v. *Lee*, 106 U.S. 196, 1 S. Ct. 240, had "continuing validity".

In *Reisman* no official holding or taking of property is involved. True, a purported statutory authority is asserted by the officer. But it is clearly alleged by Petitioners that such authority was exceeded in an unconstitutional manner for which no remedy of compensation is available anywhere.

We submit that *Larson*, as construed in *Malone*, does not hold that this mere assertion by the officer that he is acting under authority of statute bars jurisdiction of the District Court to inquire as to whether the officer in fact, does act within the authority of the statute or whether he exceeds his statutory powers. On the contrary, in the last paragraph of the *Malone* opinion this Court specifically states that no claim of an unconstitutional taking had been advanced in *Malone*, nor had it been asserted there that the officer was exceeding his delegated power.

Both claims have been advanced in the case at bar. The sworn and uncontradicted complaint specifically asserts that respondent-Commissioner is exceeding the powers delegated to him by the statute in that he is seeking information not for the purposes for which the statute gave him subpoena power, namely:

> "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax or collecting any such liability . . .",

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[2] 369 U. S. 644 at 647, 82 S. Ct. 980 at 983, Footnote 8.

but that he seeks the information in order to appropriate petitioners' trial preparation and to obtain in an unconstitutional manner evidence for criminal prosecution against petitioners' clients in violation of the Fourth, Fifth and Sixth Amendments to the Constitution.

Last, but not least, attorney-petitioners asserted that the Commissioner sought to deprive them of their own property and work product in an unconstitutional manner. All of the exceptions to the Sovereign Immunity Doctrine —so carefully spelled out both in *Larson* and *Malone*— therefore are clearly present in the case at bar.

This distinction between *Larson* and the line of cases on which Petitioners rely for jurisdiction was clearly expressed by the Court of Appeals for the District of Columbia, sitting *en banc*, in *West Coast Exploration Co.* v. *McKay*, 213 F. 2d 582; 93 U.S. App. D.C. 307 (1954):

> "In brief, the action or inaction questioned in the Larson case was that of War Assets in the exercise of its authority in disposing of surplus property of the Government and in negotiating and performing contracts for such disposal. It was not charged in the complaint that War Assets had acted beyond that authority or unconstitutionally."
> — at pp. 594-595.

The Court then correctly construed the ruling of this Court in *Larson* as based upon the fact that the complaint there had "charged erroneous action on the part of War Assets *within* its authority and not conduct beyond the power of War Assets or of unconstitutional character." *Reisman*, however, clearly charges erroneous action of an unconstitutional character on the part of respondent-Commissioner and also charges that such action is *outside* his statutory authority. The Court of Appeals holding to the contrary is—we submit—in error.

Reliance by the Court of Appeals on *Larson* and *Malone*, therefore, seems misplaced.

Wells v. *Roper*, 246 U.S. 335, 38 S. Ct. 317 (1918), and *Louisiana* v. *McAdoo*, 234 U.S. 627, 34 S. Ct. 938 (1914), the remaining two cases cited as authority for the decision below, are easily distinguished:

Wells v. *Roper* was a suit by Wells, a contractor, against Roper, an Assistant Postmaster General, to restrain the latter from annulling a contract between Wells and the United States for the furnishing of chauffeured limousines in Washington. The Assistant Postmaster General, in the exercise of his discretion and in pursuance of a Congressional appropriation, had decided to purchase automobiles for the government rather than to rent them, and to cancel Wells' contract. This presented a typical *Larson* situation. In this 1918 opinion, this Court pointed out that "no question of Defendant's official authority was involved" and that "[the] United States has consented to be sued in the Court of Claims and in the District Courts upon claims of a certain class, and not otherwise".

Thus, without formulating it as clearly as in *Malone*, the Court in effect based its holding in the *Wells* case on the same reasoning: there was neither excess of statutory authority nor "unconstitutional taking without compensation", in view of the availability of the Court of Claims.

Louisiana v. *McAdoo* involved an attempt by the State of Louisiana to restrain the Secretary of the Treasury of the United States McAdoo from instructing customs officers to admit Cuban sugar into the United States at a preferential rate of duty. The decision of this Court turned again on the holding that the Court would not interfere with an official action of a government officer involving the statutorily authorized official exercise of his judgment or discretion. Again, there was no allegation of an unconstitutional action nor did the Secretary of the Treasury exceed his statutory power, defined as the duty "to 'superintend the collection of customs duties as he shall think best'".

Thus, we submit that neither of these two cases can be proper authority for invoking the Sovereign Immunity Doctrine in the instant case, where the Complaint expressly alleges that the respondent did indeed exceed his statutory powers and acted in an unconstitutional manner.

In summary, we submit that while *Malone* v. *Bowdoin* and *Larson* v. *Domestic & Foreign Commerce Corporation* may have further limited the authority of *United States* v. *Lee* to permit suit against an officer in cases involving disputes over title to property (held in his official capacity on behalf of the United States), these holdings have not limited (or construed adversely to petitioners) the holdings of this Court in *Land* v. *Dollar*, 330 U.S. 731 (1947), 67 S. Ct. 1009, that "public officials may become tort feasors by exceeding the limits of their authority", or in *Philadelphia Company* v. *Henry L. Stimson*, 223 U.S. 605, 32 S. Ct. 340, that, "there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds".

On the contrary, *Larson* expressly held:

> ". . . where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power."

And this Court said, in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 at 136, 71 S. Ct. 624 at 630:

> ". . . Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it."

The Court of Appeals for the District of Columbia in an earlier decision in *Dollar* v. *Land*, 154 F. 2d 307 (1946) (affirmed by this Court sub nom. *Land* v. *Dollar*, *supra*), held, we submit, correctly:

> ". . . Since a court must determine at the outset its jurisdiction to proceed, it is compelled to make a preliminary decision for jurisdictional purposes on the ultimate question in the suit, and this notwithstanding the fact that when the merits are heard, it may be compelled to reach an opposite conclusion. The courts solve this problem by accepting at their face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officers—unless such assertions are 'so unsubstantial and frivolous as to afford no basis for jurisdiction * * *.' Citing Northern Pac. R. Co. v. North Dakota, 250 U.S. 135, 39 S. Ct. 502, 63 L. Ed. 897."
>
> At pp. 310, 311.

Or, as this Court expressed it in *Harmon* v. *Brucker*, 355 U.S. 583, 78 S. Ct. 433, at 435 (1958):

> ". . . Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108, 23 S. Ct. 33, 38, 47 L. Ed. 90; Philadelphia Co. v. Stimson, 223 U.S. 605, 621-622, 32 S. Ct. 340, 345, 56 L. Ed. 570; Stark v. Wickard, 321 U.S. 288, 310, 64 S. Ct. 559, 571, 88 L. Ed. 733. The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available. Moreover, the claims presented in these cases may be entertained by the District Court because petitioners have alleged judicially cognizable injuries."

In the case at bar where the jurisdictional allegations of "want of power" and "unconstitutional action" were

sworn to, are uncontradicted of record and, in part, conceded, the District Court should not have been ousted from jurisdiction by the Court of Appeals prior to trial on the merits.

C. The decision of the Court of Appeals for the District of Columbia Circuit is in conflict with those of the Courts of Appeals of the Second and Ninth Circuits.

The United States Court of Appeals for the Second Circuit in *Application of Colton*, 291 F. 2d 487 (C.A. 2, 1961), expressly held (at pp. 489 and 490) that a suit to vacate a Sec. 7602 subpoena is not a suit against the government without its consent, citing various prior cases in the Second Circuit which were finally disposed of on the merits without jurisdictional objection by the government.

In *DeMasters* v. *Arend*, 313 F. 2d 79 (1963), the Court of Appeals for the Ninth Circuit held that if defendant-revenue agents were prohibited by statute or by the Fourth Amendment to the Constitution from initiating the inquiry represented by a Sec. 7602 subpoena, "a suit to restrain their unlawful conduct would not be barred by the doctrine of sovereign immunity". (at p. 85)

In support of its holding (*ibid.*, footnote 8), the Court of Appeals for the Ninth Circuit relied on *Malone* v. *Bowdoin, supra, Larson* v. *Domestic & Foreign Commerce Corporation, supra, Harmon* v. *Brucker, supra, Stark* v. *Wickard, supra,* and other cases heretofore discussed.[3]

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[3] The citation to the Ninth Circuit's own holding in *California* v. *Rank*, 293 F. 2d 340 (C.A. 9, 1961) has since proven erroneous. This Court reversed *California* v. *Rank sub nom. Dugan* v. *Rank*, 372 U.S. 609, 83 S. Ct. 999 (1963). However, the reversal again was based solely on the application of *Larson* and *Malone* to cases involving the taking of property where the officer "had the power under authorization of Congress to seize the property . . . and this power of seizure was constitutional and permissible"—compensation being available through the Court of Claims.

We respectfully submit that under the holdings of this Court in *Larson* and *Malone* as so recently restated in *Dugan* v. *Rank*, 372 U.S. 609, 83 S. Ct. 999, *supra*, the ruling of the Courts of Appeals for the Second and the Ninth Circuits (and those of certain District Courts in the Sixth and Third Circuits[4]) are correct, and the conflict between these Circuits and the District of Columbia Circuit should be resolved by reversing the dismissal below.

D. There is no need for extension of the Sovereign Immunity Doctrine to Section 7602 cases.

a. Policy reasons must not affect interpretation of the doctrine.

The Court of Appeals for the District of Columbia quoted Mr. Justice Douglas' statement in his dissenting opinion in *Malone* v. *Bowdoin, supra,* at p. 650, that "policy considerations, not always apparent on the surface, are powerful agents of decision in sovereign immunity cases".

In effect, the Court below held that as a matter of policy the claims advanced by petitioners should not be adjudicated now but in further and later proceedings under Sec. 7604(b) where "legal objections and privileges can be interposed for judicial decision".

It is respectfully submitted that the function of the sovereign immunity doctrine is not to close the door to

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[4] In *Hinchcliff* v. *Clarke*, 205 F. Supp. 1 (D.C. N.D. Ohio E.D., 1961), the District Court took jurisdiction and the Government failed to interpose the jurisdictional defense. The motion was denied because of simultaneous pending proceedings before the U. S. Commissioner providing adjudication of the merits of the complaint. In *Application of Howard*, 210 F. Supp. 301, 302 (W.D. Pa. 1962), the Court said: "We rejected the Government's contention that this Court had no jurisdiction to quash an internal revenue summons as being an unconsented to suit against the United States . . ."

judicial review wherever a specific district court or court of appeals as a matter of policy holds that a different type of review is preferable. Conversely, it appears equally undesirable and unlawful, to permit judicial review without interposition of the doctrine in a case where, for—possibly transitory—policy reasons, an individual court were to hold that immediate review appears desirable, although such review would be unavailable under holdings of this Court.

It is significant that the judge who wrote the *Reisman* opinion for the Court dissented only a short time later from a decision interposing the sovereign immunity doctrine against review of the action of another officer of the government, the Attorney General, in connection with the Foreign Agents Registration Act. In his dissenting opinion in *Kennedy* v. *Rabinowitz*, 318 F. 2d 181 (C.A.D.C. 1963), at 186, Judge Fahy said:

> "The lines of the immunity doctrine are elusive. As this court suggested in Reisman, policy considerations are strong determinants in cases raising the problem. The majority opinion in this case does not discuss the policy reasons which serve to justify the result reached. It seems to me desirable to encourage judicial settlement of a legal dispute free from the coercive effect of penal sanctions when the dispute arises out of a regulatory statute like the one before us. As indicated above the dispute presents a justiciable issue. Accordingly there was no abuse of discretion in retention of jurisdiction by the District Court to decide whether to give a declaratory judgment."

We respectfully submit that Mr. Justice Douglas' statement in his dissenting opinion in *Malone* to the effect that "policy considerations, not always apparent on the surface, are powerful agents of decision" was not made in approval. In its context it was given as "[t]he reason the decisions [in sovereign immunity cases] are not consistent" (369 U.S. at 651).

We further submit that policy reasons should not be the grounds for interposition of the doctrine in case-to-case adjudication. The doctrine of *stare decisis* requires uniform application of the holdings of this Court.

Neither *Larson* nor *Malone* need be overruled (or limited in application or construction) in order to reverse the decision below. While the following quotation is from Mr. Justice Douglas' dissenting opinion in *Malone* v. *Bowdoin*, it is a strong argument for reversal here:

> "What Mr. Justice Miller said in United States v. Lee, supra, 106 U.S. 220, 221, 1 S. Ct. 240, 261, needs repeating:
>
> > 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.' . . ."
>
> —369 U.S. 651.

b. Policy reasons—if considered at all—weigh against restriction of review to the remedy provided by § 7604 which is inadequate in this case.

The District Court's jurisdiction under Sec. 7604(a) is not exclusive. *Application of Colton, supra.* There is no valid policy reason to make it so by an extension of the sovereign immunity doctrine.

As a matter of law, the Sec. 7604 enforcement jurisdiction of other courts, in three widely separated locations, did not oust the jurisdiction of the United States District Court for the District of Columbia.

The holding of this Court in *Malone* v. *Bowdoin* (construing *United States* v. *Lee* to be limited in application, because of the availability of the Court of Claims), cannot be interpreted to oust jurisdiction of the District Court for the District of Columbia because of the possibility of review in Sec. 7604 proceeding by another District

Court in Los Angeles, Chicago, or New York. As we interpret *Malone*, it is not the availability of the *remedy* in the Court of Claims that limits the application of *United States* v. *Lee*, but the availability of money-*compensation* through Court of Claims proceedings which frees the "taking" of property of its unconstitutional nature.

In the case at bar, the unconstitutionality of the Commissioner's action is not affected or cured by the availability of another Court in which to complain about it; there is no possibility of just compensation for an unconstitutional search, or for the deprivation of the right to the assistance of Counsel, or for violation of the privilege against self-incrimination.

In the instant case, the remedy provided by this section was totally inadequate. Respondent-accountants intended to comply with the subpoena, thus obviating any further enforcement action by respondent-Commissioner. But, even had there been refusal and subsequent enforcement action, no hearing or remedy would have been assured under Sec. 7604 without clear and present danger of arrest and attachment. *Application of United States (Carroll)*, 246 F. 2d 762 (C.A. 2, 1957), and 149 F. Supp. 634 (U.S. D.C. S.D. N.Y., 1957); *In re Wolrich*, 84 F. Supp. 481 (U.S. D.C. S.D. N.Y., 1949); *Sale* v. *United States*, 228 F. 2d 682 (CA 8, 1956). In an extreme case even criminal proceedings under Sec. 7210 might have been brought. *United States* v. *Becker*, 259 F. 2d 869 (CA 2, 1958).

c. There is no valid policy reason for restricting or for postponing constitutional objections until after criminal indictment.

Nor is there a valid policy of relegating the question as to whether any of the documents subpoenaed were obtained in violation of the taxpayers' constitutional rights to a later motion to suppress during or prior to a criminal

trial.[5] Such procedure is generally unsatisfactory to both the defendant and the government. As Chief Judge Lumbard said in his concurring opinion in *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12 (C.A. 2, 1962):

> Ordinarily, a summons "is personal to the person to whom it is directed and strangers have no standing either to substitute themselves for the person to whom it is directed, or to quash it." Albachten v. Corbett, 156 F. Supp. 863, 864 (S.D. Cal. 1957). And, as in this case with respect to the summons served on the corporation, the person summoned can, if he chooses, make an indicted taxpayer's objection for him in the form of the first objection above. This was the procedure used in Application of Myers, 202 F. Supp. 212 (E.D. Pa. 1962), and United States v. O'Connor, 118 F. Supp. 248 (D. Mass. 1953). But if the person summoned chooses not to contest enforcement, a taxpayer's rights in a pending criminal action might go unprotected unless he is permitted to assert them in the enforcement proceedings. The rules of standing are not so rigid that a court whose authority is sought in aid of a summons must keep its doors closed to the taxpayer in such a situation. Neither the taxpayer nor the government would be well served by postponing until trial a hearing of the claim that pre-trial discovery violated the Federal Rules of Criminal Procedure; at that stage it might be very difficult to unravel properly obtained evidence from that which, directly or indirectly, was obtained by allegedly unauthorized means.
>
> At p. 18.

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[5] Motions to *dismiss* the indictment in a criminal case cannot be based on the fact that evidence illegally obtained was produced before the grand jury. *U.S.* v. *Nunan*, 236 F. 2d 576 cert. den. 353 U.S. 912, rehearing denied 353 U.S. 952.

d. Adjudication on the merits would have furthered rather than delayed legitimate investigation.

Nor can it be said that an adjudication below of the complaint on its merits would have delayed or hampered respondent-Commissioner's investigation. The suit was promptly brought in one centrally located District Court prior to the return date of the subpoenas. Enforcement proceedings, on the other hand, could not have been commenced by respondent-Commissioner until after the return dates expired; they would have had to be adjudicated in three widely separated District Courts. Appellate proceedings in three courts might have led to conflicting results; would have certainly been extended and might have involved additional and collateral problems of *res judicata* and *collateral estoppel*. By erecting the barrier of the sovereign immunity doctrine against petitioners' application for prompt adjudication of essentially simple questions of fact and law, the Court of Appeals has, in fact, delayed rather than advanced any aspects of respondent-Commissioner's investigation which, upon trial on the merits, might have been found legitimate and constitutional.

II. PETITIONER-ATTORNEYS WERE ENTITLED TO A PRELIMINARY INJUNCTION ON THE FACTS OF THIS CASE.

Although urging dismissal under the sovereign immunity doctrine below, the government (in its opposition to the Petition for Certiorari) admits now that the appellate court's adoption of the doctrine in this case "raises questions of some difficulty".[6] It urges that these questions should not be decided but that petitioners' action should be dismissed substantially on the grounds advanced by the District Court.

It is respectfully submitted that the District Court's holding that petitioners had "no standing to sue" is

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[6] Brief in Opposition, p. 6.

clearly erroneous and that the Court of Appeals should have reversed the District Court's decision with directions to grant the injunction.

A. Constitutional as well as the attorney-client privilege protects all documents.

More than a year prior to the issuance of each summons an alleged multi-million dollar tax deficiency had been statutorily "determined" by respondent-Commissioner. The determination was contested by the taxpayers through petitioner-attorneys and (at the time of issuance of each summons) was awaiting immediate trial in the Tax Court.

Only one month prior to the issuance of each summons, petitioners and their clients had been advised that a criminal investigation was pending against the taxpayers and the taxpayer[1] personally had claimed his constitutional rights under the Fifth Amendment (R. 7).

Neither petitioner-attorneys nor respondent-accountants had provided any accounting advice in connection with the preparation of any of the tax returns in issue. As it were, respondent-accountants were specifically retained by petitioner-attorneys as late as April 25, 1960, "to assist [the attorneys] in connection with the above tax matters", i.e. the Federal tax liability of 1953 to 1956, inclusive, by the clients (R. 18). Thus whatever work was done did not change or affect the liability or determination.

The documents in dispute fall into four over-all categories:

(1) Original, personal, records of the individual taxpayers, as, for instance, cancelled checks, books of account, etc.;

[1] Taxpayers are husband and wife. The wife is involved only because of the filing of joint returns.

(2) Original records of a foreign corporation in which the husband-taxpayer had a minority interest.[8]

(3) Worksheets, analyses, schedules and similar material reflecting petitioner-attorneys' instructions, trial preparation and trial strategy, though physically reduced to writing by respondent-accountants at the direction or under supervision of petitioner-attorneys; and

(4) Memoranda and correspondence between attorney-petitioners and accountant-respondents containing instructions by, or reports to, petitioner-attorneys with regard to such trial preparation.[9]

(a) Each subpoena is unconstitutional as to the individual taxpayers' records because the records could not have been subpoenaed from taxpayer.

In the ordinary, small and uncomplicated tax case, the first two categories of documents (client's original records) would normally be delivered to an attorney's office for his analysis and use in trial preparation.

It is now established law in at least three Circuits that documents that are privileged and therefore cannot be lawfully subpoenaed while in the hands of the taxpayer, do not lose their immunity from subpoena when they are delivered from the physical possession of the taxpayer into the physical possession of his attorney.

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[8] Petitioner-attorneys represent this foreign corporation in connection with other matters.

[9] On argument before the District Court, respondent-Commissioner abandoned all claim to the documents in the 4th category, as well as to documents which were not located within the United States. (R. 138 and 148).

The Court of Appeals for the Ninth Circuit in the very recent case of *United States* v. *Judson*, F. 2d (C.A. 9, July 30, 1963), 63-2 USTC, ¶ 9658, said:

> "We have not been directed to, nor have we found any Supreme Court decision dealing with the precise problem before us now. The closest case is *Grant* v. *United States*, 227 U.S. 74 (1912). In that case, a subpoena duces tecum was served upon an attorney directing him to produce corporate documents which had been delivered to him by his client, Burlingame. The court said, 227 U.S. at 79-80:
>
> > 'The inquiry thus remains whether in these circumstances Grant [the attorney] could refuse their production if they would tend to incriminate his principal.
> >
> > 'Although the merits of the constitutional question are thus before us, it does not require extended discussion in view of the recent decisions of this court. The books and papers called for by the subpoena were corporate records and documents . . . They remained subject to inspection and examination when required by competent authority, and *they could not have been withheld by Burlingame himself upon the ground that they would tend to incriminate him.*' (Italics added.)
>
> "The implication from the quoted portion is that if the client *could* have withheld the documents, a *different question* would exist—a question not entirely answered by the *Hale* and *Wilson* doctrines. We feel a different question does exist. Our task is to determine whether a different result obtains."

—at p. 89645

The Court carefully analyzed and cited with approval, the case of *Application of House*, (relied on by petitioners below):

> ". . . the court in *Application of House* [56-2 USTC ¶ 9780], 144 F. Supp. 95 (N.D. Cal. 1956), had the

question squarely before it. In that case, the taxpayer had instructed his accountant to turn over to his attorney all work sheets pertaining to the taxpayer. The request was made for the purpose of aiding the attorney in representing the taxpayer in a pending tax investigation. In the course of that investigation, an administrative subpoena was served upon the attorney, directing him to produce the work sheets. As pre-existing documents, they did not fall within the attorney-client privilege, although the delivery had been made in the course of an attorney-client relationship. Indeed, the entire transaction which brought together the attorney, the taxpayer and his records was for the purpose of preparing a defense to the very investigation upon which the issuance of the subpoena was predicated. The court held that under the circumstances the attorney could rightfully refuse to produce the documents by reason of his client's Fifth Amendment privilege. The court said, 144 F. Supp., at 100:

> 'Thus, on the question of the lack of standing of an attorney to raise the claim of privilege for his client although the client does not himself utter the words effectuating the claim, or is not himself physically present, the government cites no convincing authority. The government apparently seeks to establish a novel rule that unless the client himself participates in hearings such as the one held before the agent of the Internal Revenue Bureau, he waives his Constitutional rights. The government could thus put any taxpayer to the choice of attending hearings or investigations, sometimes carried on over considerable periods of time, or waiving his privilege against self-incrimination. Such a rule would accomplish nothing except to impose a heavy penalty in terms of time and money on those taxpayers who chose to assert their right against self-incrimination under the Constitution. The effective exercise of Constitutional rights should not be abridged by any such technical and onerous requirements as that.' "

It distinguished the two cases alleged by the government to be in conflict with this decision: *United States* v. *Boccuto*,

175 F. Supp. 886 (D. N.J. 1959), and *Bouschor* v. *United States*, 316 F. 2d 451 (C.A. 8, 1963), and came to the conclusion that the "raw logic of the matter" compelled agreement with the *House* case.

Inasmuch as the Court expressed the compelling logic of its decision so much better than petitioners' Counsel could ever attempt, a quotation *in extenso* from the opinion follows:

> "The raw logic of the matter compels us to agree with the court in *Application of House, supra.* Clearly, if the taxpayer in this case, or in *House*, had been subpoenaed and directed to produce the documents in question, he could have properly refused. The government concedes this. But instead of closeting himself with his myriad tax data drawn up around him, the taxpayer retained counsel. Quite predictably, in the course of the ensuing attorney-client relationship the pertinent records were turned over to the attorney. The government would have us hold that the taxpayer walked into his attorney's office unquestionably shielded with the Amendment's protection, and walked out with something less. The way was clear, according to appellant, for an enforcement officer to gather up the evidence which otherwise would have been beyond his reach. The taxpayer's only recourse would be the marathon footwork indicated in *House*.
>
> "The thrust of the Fifth Amendment is that 'prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law.' *United States* v. *White, supra,* 322 U.S. at 698. The records now in question were not 'independent', in the sense that term is used in *White*, while in the hands of the taxpayer. By what magic did they become 'independent' when handed to an attorney for the purpose of effectively representing the taxpayer in an investigation which gives the records significance?
>
> "It has been said that since only the privilege-holder knows what will or will not incriminate, he alone knows whether the privilege should be asserted.

This reasoning is akin to the proposition that 'no one needs a lawyer to tell him he is right or wrong unless he knows he is wrong.' The government, in its brief, does recognize that 'the function of the lawyer, here, is to advise on the legal implications of disclosure.' (This puts it mildly as the setting 'here' is a tax investigation.) Guilty knowledge is no more a prerequisite for the Fifth Amendment's protection than an inference of guilt is a product of it assertion.

"The government contends that only the person who might be incriminated knows the full evidentiary facts necessary to determine if the disclosure of the information sought might tend to incriminate him, and that 'the courts should not allow this decision to be delegated to an agent.' But the decision whether disclosure might tend to incriminate is not made by the privilege-holder, his attorney, the prosecution or the jury. It is made by the court. The process for determining the incriminating character of evidence is plainly set forth in *Hoffman* v. *United States*, 341 U.S. 479 (1951). Again we emphasize that the incriminating character of the evidence is not in question in this case.

"The government states that the evil which the Fifth Amendment sought to prevent is not present when the prosecution seeks evidence of A's guilt from B. But this argument ignores the realities of the relationship existing where B is A's attorney. An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has. No other 'third party', nor 'agent', nor 'representative' stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry.

"The government argues that if the privilege-holder doesn't want the protection offered by the Amendment, law enforcement would be needlessly hampered if someone else were allowed to invoke it. The argument has merit where the hypothesis is correct. But again, the argument loses sight of the attorney's role: as an advocate of the client's position, he is deemed to know that position.

"There can be little doubt of the taxpayer's position here. This is not a situation where the privilege-holder thought so little of the privilege, or so doubted its applicability, that he allowed the judicial process to ignore it. The taxpayer knew that his attorney was withholding documents from the grand jury, and he knew the grounds asserted. He was present and testified at the hearing on appellee's motion to quash. True, no one asked him if he desired the result his attorney was so arduously trying to achieve. But if the government thought for one minute that the taxpayer was willing for the information to be disclosed, would it have remained so mute?

"We feel that the privilege-holder's mental attitude was sufficiently demonstrated by the circumstances to be consistent with a desire for the protection of the privilege and inconsistent with an inference of waiver. This is enough, when coupled with a timely and effective assertion by the attorney, to invoke the privilege. The privilege must then be respected if the client himself could have successfully raised it.

* * *

"The government has at its disposal inquisitorial powers and administrative procedures which it may invoke at its pleasure. If the government's position were sustained here, those powers could be utilized to stimulate a taxpayer's consultation with his attorney and the predictable transfer of his records. The government's powers could then be utilized to compel disclosure of those matters by the attorney whenever the taxpayer were not available to utter the magic words. In our judgment, the inherent power thus to compel indirectly an individual's self-incrim-

ination is curbed by the Fifth Amendment as effectively as the power to compel the same result directly."

—*United States* v. *Judson*, 63-2 USTC ¶ 9658, pp. 89647, 89648.

The Court of Appeals for the Second Circuit arrived at a similar holding in *United States* v. *Guterma*, 272 F. 2d 344 (1959). So did the Eighth Circuit in *Schwimmer* v. *United States*, 232 F. 2d 855 (1956).

We respectfully submit that under *Grant* v. *United States*, *supra*, the holding in these three Circuits is in accord with the law as laid down by this Court.

(b) The workpapers reflecting trial strategy are immune from subpoena under the Fifth and Sixth Amendments.

For the third category of papers, the accounting analyses, worksheets and schedules prepared by respondent-accountants either for, or in cooperation with, or under supervision of, petitioner-attorneys, the main constitutional claim for protection rests on the taxpayers' right to the effective assistance of Counsel and due process of law.

No demonstrative evidence is required to show that to a tax attorney or revenue agent, detailed accounting analyses of taxpayers' transactions demonstrate the theories of defense as clearly as if they were spelled out in a trial brief. That disclosure in advance of trial or during a pending criminal investigation of theories of defense would hamper effective assistance by Counsel, requires no elaboration.

The schedules further reflect information that the client furnished through the accountants to the attorneys. The accountants here intervened for the sole purpose of relating such client information in intelligible and intelligent form to the attorneys so that Counsel would be able to understand, digest and evaluate the raw information provided by the client. In *Lewis* v. *United Airlines Transport*

Corporation, 32 F. Supp. 21 (W.D. Pa. 1940), and *Schuyler* v. *United Airlines*, 10 F.R.D. 111 (M.D. Pa. 1950), the attorney needed an expert in connection with an airplane crash; in *Lalance and Grosjean Mfg. Co.* v. *Haberman Mfg. Co.*, 87 Fed. 563 (2d Cir. 1898), and in *Cold Metal Process Co.* v. *Aluminum Co. of America*, 7 F.R.D. 684 (D. Mass. 1947), he needed a patent expert. In all these cases the attorney-client privilege was held to extend to the assistant or amanuensis, required by the attorney to give effective assistance.

The Court of Appeals for the District of Columbia has recognized the constitutional right to effective assistance of Counsel in two cases, holding:

> "These cases unequivocally establish the principle that the two amendments guarantee to persons accused of crime the right privately to consult with counsel both before and during trial. This is a fundamental right which cannot be abridged, interfered with, or impinged upon in any manner."
>
> —*Coplon* v. *United States*, 191 F. 2d 749, 759 (C.A. D.C. 1951), 89 U.S. App. D.C. 103, (Cert. Den.) 72 S. Ct. 363, 342 U.S. 926, 96 L. Ed. 690;

and

> "The Constitution's prohibitions against unreasonable searches, and its guarantees of due process of law and effective representation by counsel, lose most of their substance if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense."
>
> —*Caldwell* v. *United States*, 205 F. 2d 879, 881 (C.A. D.C. 1953), 92 U.S. App. D.C. 355.

Coplon very effectively showed that denial of the effective assistance of Counsel is not only in violation of the Sixth, but also of the Fifth Amendment to the Constitution.

"We are confronted, however, with another and a a much more serious question with respect to the government's alleged wiretapping. In support of her motion for a new trial, the appellant charged that Bureau agents intercepted telephone conversations between her and her counsel, both before and during her trial in the District of Columbia.

"If this occurred, it was a violation of the appellant's constitutional rights. The Fifth Amendment enjoins that no person be deprived of life, liberty or property without due process of law. Such due process includes the right of one accused of crime to have the effective and substantial aid of counsel. *Neufield* v. *United States* (1941), 73 App. D.C. 174, 182, 118 F. 2d 375, 383. Moreover, the Sixth Amendment provides that 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.'"

—at p. 757.

Whether the government obtains access to trial preparation and attorney-client consultation by wiretap or by subpoena, is immaterial as far as the constitutional prohibition is concerned.

There can be no doubt that in the instant case the intended violation of the Fifth and Sixth Amendments was more than incidental. Both in the Court below and before this Court, respondent-Commissioner has urged speedy determination in view of the possible running of the criminal Statute of Limitations (Opposition to Stay, p. 2). The subpoenas were issued by a Special Agent, not a Revenue Agent, whose sole function is that of seeking evidence of crimes.[10]

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[10] In an article by Joseph W. Burns, entitled "Searches and Seizure" [reprinted in 20 Institute of Federal Taxation, New York University 1081, 1087 (1962)], the distinction is very clearly set out:

"Some courts have failed to realize the great distinction between the function of an Internal Revenue Agent and a

As the Court said in *United States* v. *O'Connor*, 118 F. Supp. 248 at 250 (D.C. Mass. 1953):

"So far as this Court knows, Congress has never in criminal matters vested the executive with an unrestricted subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases. Cf. In re National Window Glass Workers, D.C.N.D. Ohio, 287 F. 219. Rule 17(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., has only the limited function of procuring production of papers for use in evidence at a trial. It is not the equivalent of pretrial discovery. Cf. Bowman Dairy Co. v. United States, 341 U.S. 214, 220, 71 S. Ct. 675, 95 L. Ed. 879.

"The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure. That is the inquisitorial body provided by our fundamental law to

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Special Agent. The Constitution gives the government the right to collect taxes and Congress has enacted statutes containing various provisions to enable the Commissioner of Internal Revenue to investigate both civil tax liability and criminal offenses against the revenue. These are two separate and distinct functions, and he has set up separate and distinct divisions to carry out these functions. The function of investigating to determine civil tax liability has been assigned by the Commissioner to Internal Revenue Agents, who are in the Audit Division. (26 CFR 601.105(b)).

"The sole function of a Special Agent in the Intelligence Division of the Internal Revenue Service is to seek evidence of crimes. He has no concern whatsoever with the amount or collection of any additional tax, these being strictly the concern of the Revenue Agent. He is exactly the same as any other Treasury agent who may seek evidence of narcotics, counterfeiting, alcohol tax, customs violations, etc. A Special Agent is a criminal law enforcement officer, just like any state or municipal detective or policeman. He, like any other government agent who enforces the criminal law must obtain a valid search warrant."

subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization. See Hale v. Henkel, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652.

"To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. The power under § 3614 was granted for one purpose, and is now sought to be used in a direction entirely uncontemplated by the lawgivers. The limitations implicit in every grant of power are that it will be used not colorably, but conscientiously for the realization of those specific ends contemplated by the donors of the power."

Thus, categories 1 and 3 of the records subpoenaed were clearly protected by the taxpayers' constitutional privileges under the Fourth, Fifth and Sixth Amendments and by the common-law attorney-client privilege as such. Certain of the documents in the second category (the corporate papers) were equally protected by the attorney-client privilege. *Radiant Burners, Inc.* v. *American Gas Association*, F. 2d (C.A. 7) (No. 13960, C.A. 7, June 28, 1963). In addition, the records belonging to the foreign (non-U. S.) corporation were, and still are claimed, as being immune to subpoena because of the fact that the corporation is not subject to the visitorial or regulatory power of the sovereign, the custodian of the corporate records holding them "in a purely personal capacity". 8 Wigmore on Evidence, Sec. 2259(b), Supp. p. 129; *Application of Daniels* (D.C. S.D. N.Y.), 140 F. Supp. 322 (1956), affirmed *sub nom. International Commodities Corporation* v. *I.R.S.*, 224 F. 2d 882 (1955).

(c) The attorney-client privilege applies because the accountants acted as the attorneys' agents.

Neither the constitutional nor the attorney-client privilege was lost because some of the worksheets prepared under the supervision, or for the use, of the attorneys were, in fact, physically put on paper by non-attorney accountants.

The accountants in this case were hired by the attorneys for one purpose, and one purpose only: to help them in the preparation of these civil and criminal cases. Except for their special skill, they were in the identical legal position as petitioners' stenographer and petitioners' law clerk who had not yet passed the bar, and whose research was a vital link in providing the legal advice petitioners were retained to furnish. No accounting advice was needed or received by the taxpayer nor by the attorneys, and the District Court's finding to the contrary (R. 148, 149) was clearly erroneous.

The Court of Appeals for the Second Circuit has recognized the necessity for the employment by attorneys of accountants in these days of increasing difficulty and magnitude of business transactions. In *United States* v. *Kovel*, 296 F. 2d 918 (C.A. 2, 1961), the Court held:

> ". . . In contrast to the Tudor times when the privilege was first recognized, see 8 Wigmore, Evidence § 2290, the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. 'The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agent.' 8 Wigmore, Evidence, § 2301; Annot., 53 A.L.R. 369 (1928).
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> —at p. 921.

Petitioners therefore were entitled to the relief prayed for, pending trial on the merits. At the very least, the Court of Appeals should have remanded the case to the District Court for an *in camera* inspection of the documents for which privilege was claimed.

B. Petitioners have standing to sue to protect their work product and their professional ability to function as attorneys.

Petitioners argued below and argue before this Court that—while the constitutional and attorney-client privileges are originally the clients' to claim—the attorneys have standing to sue in order to enforce such claim in their clients' behalf. *Baird* v. *Koerner*, 279 F. 2d 623 (C.A. 9, 1960); *United States* v. *Judson*, *supra*.

But petitioners also argued below and argue here, that they had standing to protect their own ability as attorneys to render effective assistance to their clients. *Warrick* v. *C.I.R.*, 173 F. 2d 905 (C.A. 8, 1949). Failure to bring this suit in order to prevent unconstitutional seizure of the documents entrusted to them might have constituted an effective but unauthorized and therefore actionable waiver of the clients' constitutional rights. *United States* v. *Bender*, 218 F. 2d 869 (C.A. 7, 1955), and *Banks* v. *United States*, 204 F. 2d 666 (C.A. 8, 1953).

Finally, they argue that Conclusion of Law No. 4 by the District Court (R. 149) to the effect that "the work papers and audit reports prepared by the accounting firm of Peat, Marwick, Mitchell & Co. constitute the work product of the accountants and not the work product of the plaintiffs", is clearly erroneous. All the work of the respondent-accountants was done under the supervision, with the help and direction of the petitioner-attorneys, reflecting the attorneys' mental impressions and ideas. Therefore it is petitioners' work product which they have "standing" to protect against unlawful appropriation.

In *Hickman* v. *Taylor*, 329 U.S. 495, 67 S. Ct. 385 (1947), this Court protected the work product of an attorney although it consisted of witnesses' oral statements as taken down by, or for the attorney.

In the instant case the work product protection is invoked on, we submit, even stronger grounds than in *Hickman* v. *Taylor:* (1) not only did the attorneys intend to use the accountants as witnesses in the trial of the tax cases,[11] but (2) the worksheets of the accountants also reflected various legal theories of the attorneys which the accountants in the course of their work proved out mathematically. Some of these theories might later be discarded as unprovable; others would be, indeed, revealed at the trial of the case. Regardless, all of them were reflections of the mind of Counsel and "no legitimate purpose" could have been served by their production. *Hickman* v. *Taylor, supra,* at 513; 67 S. Ct. at 394.

It is submitted that had these worksheets been in the physical possession of the attorneys at the time of issuance of the subpoenas, the attorneys would have had standing to sue to protect their unconstitutional appropriation by respondent-Commissioner through subpoena directed to them. Under the ruling of *United States* v. *Guterma, supra,* and *United States* v. *Judson, supra,* the fact that they were in petitioners' constructive possession only, rather than physical, did not deprive petitioners of their standing in Court.

CONCLUSION

It is prayed that, inasmuch as (1) the suit below was not barred by the sovereign immunity doctrine; (2) petitioners had standing to sue; and (3) petitioners were entitled to the relief prayed for, the Judgment of the

[11] Two representatives of respondent-accountants did, in fact, appear at the trial of the cases in Los Angeles.

Court of Appeals be reversed, with instructions to remand the case to the United States District Court for the District of Columbia to issue the injunction, pending trial on the merits.

Respectfully submitted,

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